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In the Supreme Court of the United States

October Term, 1967

No. 1344

SALEM BUILDING TRADES COUNCIL, AFL-CIO,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent

and

CASCADE EMPLOYERS ASSOCIATION, INC.,
Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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CASCADE EMPLOYERS ASSOCIATION, INC.,
Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Salem Building Trades Council, AFL-CIO, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above case on February 15, 1968.

CITATIONS TO OPINIONS BELOW

The National Labor Relations Board issued its conclusions and order on February 20, 1967. This is reported in 163 NLRB No. 9. The opinion of the Court of

Appeals, affirming *per curiam*, is not yet reported. It is printed in Appendix B, infra 3a.

JURISDICTION

The judgment of the Court of Appeals was entered on February 15, 1968, infra 3a. Petitioners did not ask for a rehearing. The jurisdiction of the Court is invoked under 28 USC, §1254 (1).

QUESTIONS PRESENTED

1. Whether the use of the present tense in Section 8(b)(4)(ii)(B) of the Labor Management Relations Act, which makes it an unfair labor practice to force or require any person ". . . to cease doing business with another," restricts its application to those situations where a business relationship exists at the time of the union conduct.

2. Whether the protection afforded consumer picketing by *NLRB v. Fruit & Vegetable Packers (Tree Fruits)*, 377 US 58 (1964), applies to consumer picketing by Building Trades Unions.

3. Whether the failure of secondary employers to show any economic loss as a result of picketing precludes a finding of a violation of Section 8(b)(4)(ii)(B) of the Labor Management Relations Act.

4. Whether informational patrolling of premises

built under substandard conditions, which does not induce work stoppage, cessation of business, or economic loss, is protected by the First Amendment's guarantee of free speech.

5. Whether the National Labor Relations Board has the inherent power to assume or infer, without notice, critical adjudicative facts not in evidence.

STATUTE INVOLVED

The relevant provisions of the statute involved, the Labor Management Relations Act (61 Stat. 136, 73 Stat. 519, 29 USC, §151, et seq.) are printed in Appendix A, infra 1a.

STATEMENT

1. The Factual Background.

The facts are undisputed and were stipulated to by both parties. The Salem Building Trades Council, AFL-CIO, has had a labor dispute with Reimann Construction Company since January of 1963, over the substandard wages and working conditions of its employees (R. 24). The wages and other benefits paid by Reimann were substantially below the rates prevailing in the Salem, Oregon, area (R. 26-27).

Reimann was awarded a contract in early 1965 to construct a new motel, the Hyatt Lodge, near Salem,

Oregon. Northridge Industries, Inc., owned this new motel (R. 24). Reimann, using nonunion carpenters and laborers, completed the new motel and left the premises on October 11, 1965 (R. 25). Prior to this time, no picketing took place. Between November 8 and December 20, 1965, pickets from the Salem Building Trades Council patrolled outside the premises of the new Hyatt Lodge (R. 25).

In June of 1965, Reimann was engaged by Candelaria Investment Co., an Oregon corporation, to build a new shopping center in Salem, Oregon, to be called the Candelaria Shopping Center (R. 25). Here, too, Reimann completed the building with nonunion carpenters and laborers. This project was completed on October 14, 1965, and Farrell's Ice Cream Parlor, one of the new tenants, opened for business in the premises on November 9, 1965 (R. 25). Between November 9 and November 15, 1965, pickets from the Salem Building Trades Council sporadically patrolled near Farrell's premises (R. 26).

In both instances, the picketing took place only after Reimann had permanently vacated the premises. In each case, the picket placards contained the legend, "This/Building/Built Under/Sub-Standard/Wages and Conditions/By/Reimann Construction Company/Salem Building Trades Council" (R. 25-26). Pick-ups and de-

liveries did not diminish during the picketing, and the employees of both Hyatt and Farrell's continued working during this period (R. 27, 40). At the time of the picketing, there was no existing business relationship between Hyatt and Reimann or between Farrell's and Reimann (R. 24-27, 35-36).

2. Proceedings Before the National Labor Relations Board.

As a result of the picketing, the Cascade Employers Association, Inc., a group both Hyatt Lodge and Reimann belonged to, filed unfair labor practice charges, and a complaint was issued by the General Counsel on December 17, 1965 (R. 9-13).

The parties entered into a stipulation of facts before the Board and waived proceedings before a Trial Examiner. On February 20, 1967, the Board issued its conclusions and order (163 NLRB No. 9). That portion of the complaint based on Section 8(b)(4)(i)(B) of the Act was dismissed on the grounds that there was no evidence that the Respondent's conduct was calculated to invite neutral employees to make common cause by engaging in work stoppages. The Board then concluded that the Petitioner's picketing violated Section 8(b)(4)-(ii)(B) of the Act, on the ground that the picketing was for the purpose of forcing Farrell's and Hyatt to cease doing business with Reimann.

In its opinion, the Board ordered the Petitioner to cease and desist from threatening, coercing or restraining the named employers, or any other persons, in a manner prohibited by Section 8(b)(4)(ii)(B), and required petitioner to post appropriate notices and provide signed copies of the notice to the employers for posting on their premises (R. 40-42).

3. Proceedings in the Court of Appeals.

Petitioner declined compliance with the Board's conclusion and order. On August 24, 1967, the Board's General Counsel petitioned the Ninth Circuit for an order of enforcement (R. 44). The matter was briefed, and after oral argument, the Court of Appeals issued a *per curiam* opinion on January 22, 1967, affirming the Board's action (Infra, 3a). On February 15, 1968, the Court of Appeals issued its formal decree ordering the petitioner to comply with the Board's orders.

4. Pending Actions.

In late 1965, two damage actions were instituted against the Salem Building and Construction Trades Council, arising out of the picketing in question here. Both actions were based on Section 303 of the Act (29 USC, §187(b)). In *Reimann Construction Co. v. Salem Building & Construction Trades Council*, Civ No 65-574 (D Ore), the plaintiff sought $90,000 plus "all further

damages." In *Hyatt Chalet Motels, Inc., v. Salem Building & Construction Trades Council*, Civ No 65-573 (D Ore), the plaintiff sought $28,000 plus "all further damages." Both complaints have recently been amended, with the prayer in *Reimann* being increased to $148,000, and the prayer in *Hyatt* being increased to $30,000.

These actions had been postponed pending a final determination of the questions raised in this case, but have now been given a firm trial date for June of 1968.

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS HAS DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT, BUT SHOULD BE, SETTLED BY THIS COURT.

This case presents for decision several questions, some of first impression, which are of extreme importance to the federal law governing labor management relations. Their resolution would lessen uncertainty in this field.

A. Interpretation of the "Cease Doing Business" Clause of 8(b)(4)(ii)(B).

Section 8(b)(4)(ii)(B) of the Act makes it an unfair labor practice for a union to force or require any person ". . . to cease doing business with another." Congress, in drafting this particular section, chose to use the present tense. It is presumed that the legislature,

in phrasing a statute, knows the ordinary rules of grammar, and that the grammatical reading of the statute gives its correct sense. See, e.g., *United States v. Goldenberg*, 168 US 95 (1897). Prior to this case, the Courts and the Board, when construing this particular language, have held that it requires an *existing* business relationship. *NLRB v. Milk Wagon Drivers Union, Local 753*, 335 F2d 326, 328 (7th Cir. 1964); *Hoffman v. Joint Council of Teamsters No. 28*, 230 F Supp 684, 688 (ND Cal ND, 1962) (construing Section 8(e) of the Act); *Local 3, International Brotherhood of Electrical Workers*, 140 NLRB 729, 730 (1963). This Court has often stated that the statute, when used to impede peaceful picketing, is to be strictly and cautiously construed. See e.g., *NLRB v. Fruit & Vegetable Packers (Tree Fruits)*, 377 US 58, 62-64 (1964); *NLRB v. Drivers Local Union*, 362 US 274, 284 (1960).

Section 7 of the Act, as amended in 1947, guarantees labor the right to engage in concerted activities. 61 Stat 140 (1947), 29 USC, §157. Section 13 permits limitations on that right only as specifically provided for. 61 Stat 151 (1947), 29 USC, §163. Section 13 has been applied to picketing. *NLRB v. Drivers Union*, supra, n. 9; cf. *International Union, U.A.W. v. Wisconsin Employment Relations Board*, 336 US 245, 259-60 (1949). Section 13 declares a rule of construction which cautions against an expansive reading of the Act, which would

impinge upon labor's right to enter into concerted activities. *NLRB v. Drivers Union*, supra, at 282.

Here, the stipulation of the parties, which constituted the entire record, made it clear that at the time of the picketing there was no existing business relationship between Reimann, on the one hand, and Farrell's, Candelaria, and Northridge, on the other (R. 24-27, 35-36). There was no indication of any future business relationship between the parties, and this was acknowledged by the Board (R. 35-36). Petitioner contended that the use of the present tense in the Act, together with the above authorities, precluded a violation of that Section.

The Board found a violation, and this was affirmed by the Court of Appeals. Although the Act has been in effect over 20 years, neither the Board nor the Courts had previously interpreted that section to cover a situation where there was admittedly no business relationship at the time of the picketing. This section is an integral part of the secondary boycott aspects of the Act. The Board's determination will have widespread repercussions. This unprecedented interpretation should be reviewed.

B. The Application of The Consumer Picketing Exception to Building Trades Situations.

In *N.L.R.B. v. Fruit & Vegetable Packers (Tree Fruits)*, 377 US 58 (1964) this Court held that peaceful

picketing of products prepared under substandard conditions, at the consumer level, would be nonviolative of the Act if not ". . . attended by the abuses at which the statute was directed." (377 US at 64).

Here, as in *Tree Fruits*, the Union followed the products of the concern to the secondary sites at the consumer level. In both instances, there was no work stoppage or cessation of pick-ups and deliveries. In *Tree Fruits*, the Union directed the public not to purchase a specific product, whereas here, there was no such appeal. The placards merely publicized the fact that the buildings were built under substandard conditions.

The Board here rejected the application of *Tree Fruits*, on the ground that even if the buildings were the product of the employer, such informational picketing could only be employed to "persuade customers not to trade at all" with the secondary employers (R. 39).

The Board's refusal to apply *Tree Fruits* to a Building Trades situation imposes an insurmountable burden upon this large segment of organized labor. If they are unable to follow the product, even in the limited sense of *Tree Fruits*, then the guarantee provided by Section 7 of the Act is, to these members of the labor movement, meaningless. This point should be reviewed.

C. The Absence of Economic Loss.

Prior to this Court's opinion in *Tree Fruits*, the Cir-

cuits were divided as to whether a *per se* violation of Section 8(b)(4)(ii)(B)'s test ("to threaten, coerce, or restrain") was present whenever secondary picketing took place. Some felt that the picketing itself was a violation, even in the absence of a showing of any economic loss. See, e.g., *Burr v. NLRB*, 321 F2d 612 (5th Cir., 1963). Others, such as the Court of Appeals for the District of Columbia, in reviewing the Board's determination in *Tree Fruits*, felt that picketing was not a *per se* violation, but that economic loss was the key. *Fruit & Vegetable Packers & Warehousemen v. NLRB*, 308 F2d 311 (DC Cir 1962), reversed, 377 US 58 (1964).

This Court reviewed the latter approach in *Tree Fruits* and concluded that even economic loss would not result in a violation in certain situations (377 US at 72-73).

This Court's language in that opinion has not, however, settled the question. There is still confusion. By saying that economic loss in itself would not always be sufficient, did the Court also mean that some showing of economic loss was a minimal requirement for a violation? The opinion is not clear.

This case presents the Court with an opportunity to address itself to the question. Here, neither Farrell's, Northridge, nor Candelaria proffered any testimony or statistics as to loss of business. It was stipulated that

there was no work stoppage or diminution of pickups and deliveries. There is, in short, no inference of economic loss.

D. Application of Free Speech.

The decisions seem clear that a violation of Section 8(b)(4)(ii)(B) will be found only if there is evidence *aliunde* that the activity was coercive. *NLRB v. Fruit & Vegetable Packers (Tree Fruits)*, 377 US 58 (1964); *Wholesale Employers, Local 261, v. NLRB*, 282 F2d 824, 826, 827 (DC Cir, 1960); *NLRB v. Brewery Workers*, Local 366, 272 F2d 817, 819 (10th Cir, 1959); *NLRB v. General Drivers, Local 968*, 225 F2d 205, 210, 211 (5th Cir, 1955); cert. denied, 350 US 914.

Here, there was no evidence in the stipulated facts which would indicate any loss of business. In addition, as set forth above, the parties agreed as to the absence of any work stoppage or work disruption. Given these facts, it would seem that the conclusion is inescapable that the Board has decided that peaceful, informational picketing is *per se* coercive. Petitioner feels that such a restriction on the informational patrolling itself is an unconstitutional abridgement of free speech. U. S. Constitution, First Amendment; *Chauffeurs, Teamsters & Helpers Union v. Newell*, 356 US 341 (1957), reversing 181 Kan 898, 317 P2d 817. This aspect of the case presents an important question of federal constitutional

law. Heretofore, the Constitutional issue has been avoided by a finding that some aspect of the union's conduct was indeed "coercive." But in this situation we have none of the normal facts for such a finding, e.g., loss of customers or loss of workers.

Where the language of a statute will bear two equally obvious interpretations, the one clearly in accordance with the Constitution is preferred. See, e.g., *United States v. C.I.O.*, 335 US 106 (1948). Here, the Court might conclude that Section 8(b)(4)(ii)(B) could as easily have been applied in this case in such a way as to allow the uncoercive informational patrolling. The issue is of extreme importance to organized labor. The First Amendment's guarantee of free speech has of late been liberally interpreted in several areas. *Roth v. United States*, 354 US 476 (1957); *United Mine Workers v. Illinois State Bar*, _____ US _____, 19 L ed 2d 426 (1967). Here, the Court would have the opportunity to examine the free speech aspects of an informational picketing situation which is devoid of the traditional indices of "coercion."

2. THIS CASE PRESENTS IMPORTANT QUESTIONS AS TO THE INHERENT POWER OF FEDERAL ADMINISTRATIVE AGENCIES TO INFER ADJUDICATIVE FACTS NOT IN EVIDENCE.

In deciding the issues set out above, the Board as-

sumed (or inferred) several critical facts not contained in the formal stipulation of the parties, which by agreement constituted the entire record in the proceeding. Although these assumed facts are inseparably connected with several of the issues, they are collectively dealt with here because of the importance of viewing them *in toto*.

The Board declared that even if an existing business relationship was necessary for an 8(b)(4)(ii)(B) violation, that requirement would be met because Reimann was a potential contractor for future new business sites of the secondary employer involved (R. 37). In conjunction, the Board concluded that the secondary employers had experienced growth in the past and would probably continue to expand in the future (R 36-37). Nowhere in the stipulation, however, is there mention that any of the secondary employers had used Reimann in the past, or intended to do so in the future. The Board's opinion acknowledged as much (R 35-36). In addition, there was nothing to indicate that any of those concerns had plans of expanding, either nationally or in the Salem area, or that they had experienced growth in the past.

With regard to the Board's conclusion that the picketing was "coercive," thus preventing free speech guaranties from entering the picture, the Board made two

critical inferences. First, it concluded that the petitioner's failure to picket Reimann's general offices evidenced that the activity was solely designed to inflict damage on innocent neutrals, forcing them to bring pressure on Reimann. (R. 39)[1]. Nowhere in the record is there any indication that Reimann's general offices were not picketed. The stipulation simply did not encompass this aspect of the case. Secondly, the Board points to a threat made to Hyatt by a separate, state-wide labor association, as evidence of petitioner's evil intent (R. 38). Beside the fact that this threat was never carried out, there is nothing in the record which would show an agency relationship, or any connection (direct or indirect) between petitioner and this other association.

These assumed facts, none supported in the record, were critical to the Board's determination. This aspect of the case presents this Court with an opportunity to review the inherent powers of federal administrative agencies to assume, or infer, facts not in evidence.

When an agency determines (or assumes) facts concerning the immediate parties before it—who did what, where, when, how, and with what motive and intent—the agency is performing an adjudicative function and is developing adjudicative facts. Opposed to

1. The General Counsel's brief before the Circuit Court, at pp. 15-16, also indicates the great weight which the Board gave this supposed "fact."

these adjudicative facts are legislative facts, which do not concern the immediate parties. Adjudicative facts must be supported by the evidence, but legislative facts need not be. Davis, *Administrative Law Text*, §15.03 (1958). This Court has recognized the distinction. In *Gonzales v. United States*, 348 US 407, 413 (1955), the Court distinguished several cases on the ground that "they do not involve individualized fact finding and classification, but legislative determinations, political judgments, and the exercise of judicial discretion . . .".

But this Court has not yet clarified the continuing question of whether parties should be notified of, and allowed to rebut, adjudicative facts not in the record, which the agency intends to find. Neither has this Court yet determined whether an administrative agency has the inherent power to infer or assume critical adjudicative facts which are not in evidence.

The field of administrative law is expanding more rapidly than any other. One of the initial questions in this broad area is the power of agencies to assume or infer facts, either to reach a sought conclusion or to bolster one previously determined. It is crucial that some guidelines be established in order to add a semblance of certainty and order to the field. Such guidelines should emanate from this Court. This case presents an opportunity to closely examine this important question.

CONCLUSION

Petitioner believes that the petition should be granted for the foregoing reasons.

Respectfully submitted,

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April 9, 1968.

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